No. 05-1575

IN THE

Supreme Court of the United States

DORA B. SCHIRO, *ET AL.*,
Petitioners,

v.

JEFFREY TIMOTHY LANDRIGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred when it remanded for an evidentiary hearing after concluding that respondent Jeffrey Landrigan, who was denied an evidentiary hearing in state court, had alleged facts in connection with his federal habeas petition that, if proved, would entitle him to relief on his claim that he was denied his Sixth Amendment right to effective assistance of counsel.

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INTRODUCTION

For page after page, the State's brief tries to convince this Court that the en banc Ninth Circuit violated the provisions of 28 U.S.C. § 2254(d), which limit the extent to which a federal court can grant habeas corpus relief after it has examined state-court rulings on the merits of a federal constitutional claim. But no such questions are involved at the present stage of this case. The Ninth Circuit has not "granted" Landrigan's habeas petition. *See* 28 U.S.C. § 2254(d). The Ninth Circuit's only holding to date is that "Landrigan has demonstrated the proper basis for an evidentiary hearing" on a single claim that he was denied his Sixth Amendment right to effective assistance of counsel. Pet. App. A-21. The appeals court emphasized that it was "not opining on what the district court's ultimate resolution of this issue should be." Pet. App. A-21.

The Ninth Circuit's ruling that Landrigan is entitled to an evidentiary hearing is all that is before this Court. That ruling is unassailable under established law. The Ninth Circuit correctly concluded that Landrigan had not "failed to develop the factual basis" for his ineffective assistance claim in state court within the meaning of 28 U.S.C. § 2254(e)(2) – the only limitation Congress has imposed on evidentiary hearings in federal court – because the Arizona state courts denied Landrigan the opportunity he sought to develop the factual basis for his claim. The Ninth Circuit also correctly held that the facts alleged by Landrigan state a colorable claim for relief, which was all that was required at this preliminary stage of the case. Neither the State's petition for certiorari nor its merits brief (nor, for that matter, its briefs to the Ninth Circuit) advances any argument to the contrary.

As a unanimous Court said in *Michael Williams v. Taylor*, "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable

to develop his claim in state court despite diligent effort." 529 U.S. 420, 437 (2000). Here, despite Landrigan's diligent effort, he has been denied an evidentiary hearing in both state and federal court to present the evidence he needs to prove his entitlement to relief. There is no justification for concluding that Landrigan's claim should be definitively resolved now without evidentiary development – a step that would severely "diminish the likelihood that [the lower courts] will base their legal decision on an accurate assessment of the facts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting).

STATEMENT OF THE CASE

A. Guilt/Innocence Trial

Landrigan was indicted for the 1989 murder of Chester Dean Dyer. Although initially charged with second degree murder, JA 8,[1] Landrigan was subsequently indicted for first degree murder. Dennis M. Farrell of the county public defender's office was assigned as Landrigan's sole attorney. Landrigan's trial was Farrell's first capital case, and his first murder case to go to trial.

Both prior to and during trial, the State offered to allow Landrigan to plead guilty to second degree murder with a stipulated sentence of twenty years in prison. *See, e.g.*, JA 8; Tr. at 13 (June 28, 1990). Landrigan elected to exercise his constitutional right to trial, however, and he was convicted on June 28, 1990.

[1] The index to the Joint Appendix filed by petitioner contains errors. A corrected index is included as an appendix to this brief. Relevant statutory provisions are set out in the Statutory Addendum to this brief.

B. Sentencing

The case proceeded to sentencing before the trial judge under the procedures subsequently held unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002). The State filed a sentencing memorandum contending that the death penalty was warranted.

Although the sentencing hearing was originally scheduled for July 31, 1990, Farrell sought and received three separate thirty-day continuances, purportedly to investigate and prepare a mitigation case. On each occasion, Landrigan consented on the record to the continuance, JA 10, 12-13, 15, and on no occasion did Farrell suggest that Landrigan had obstructed efforts to discover or develop mitigation evidence.

One of the three continuances was granted during a hearing on August 24, 1990, at which the court permitted the State to present its case in aggravation. *See* Tr. 3-19 (Aug. 24, 1990). Farrell offered no evidence to rebut the State's aggravation case, though there was a rebuttal case to be made. *See* Pet. App. A-20. The court then asked Farrell whether he wanted to present any part of the mitigation case at that time. He declined, and he stated that he needed more time because he was "still awaiting hospital records." JA 11. Farrell assured the trial court that if he obtained those records he would "be able to proceed at that particular time." JA 12. He was emphatic that "[i]n the presentation of mitigating factors, rather than presenting it piecemeal, I wish to present it all at one time." JA 11. The court asked whether Farrell had a "guesstimate" as to how long that presentation would take; when counsel did not respond, the judge stated that "[t]he Court assumes by your silence that you do not." JA 13.

The hearing on mitigation was ultimately held on October 25, 1990. Six days earlier, Farrell had filed a seventeen-page sentencing memorandum with hospital records attached. *See*

JA 16-52. Only six pages of the memorandum discussed Landrigan specifically, *see* JA 21-26, briefly referencing Landrigan's good conduct while incarcerated and during trial, JA 21; his history of drug and alcohol abuse, JA 21-24; anticipated testimony from Landrigan's mother about her pregnancy, JA 24-25; and the absence of any evidence of premeditation, JA 25-26. The memorandum also included a cursory sentence regarding anticipated testimony "from relatives of the defendant expressing their feelings and love for him," JA 25, and a brief discussion of a difficult family history, drawn almost exclusively from the attached hospital records, JA 24-25.

Farrell had arranged for only two witnesses to testify at the sentencing hearing: Virginia Gipson, Landrigan's birth mother, and Sandra Martinez, his ex-wife. Pet. App. D-2. Neither one testified, however, because, as Farrell explained, Landrigan told them just before the hearing that he did not want them to do so. *See* Pet. App. D-3 (noting that Landrigan did not want testimony "specifically [from] these two people I have here"). At the hearing, Farrell offered no other witnesses and no other evidence.

Following up on Farrell's statement, the sentencing judge asked Landrigan directly about his position. That led to the following colloquy – upon which the State places great emphasis but which no federal judge has ever viewed as decisive:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> LANDRIGAN: Yeah.
>
> THE COURT: Do you know what that means?
>
> LANDRIGAN: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

LANDRIGAN: Not as far as I'm concerned.

Pet. App. D-3 to D-4.

Later in the hearing the judge, apparently realizing that there would be no evidence regarding Landrigan's mental health, asked Farrell whether he had "considered whether or not a psychological evaluation should be done on your client." Pet. App. D-11. Farrell told the court that he "d[id] not have the information [he] thought necessary for those experts to testify[.]" Pet. App. D-12. He did not inform the court that some months earlier he had obtained a preliminary psychological examination of Landrigan, or that the examining psychologist had proposed a detailed follow-up evaluation to be used in mitigation – a proposal that Farrell never implemented. JA 246-47.

After giving Landrigan a final opportunity to speak and eliciting a graphic response, the judge imposed sentence. Pet. App. D-18 to D-23. She found first that the State had proved two aggravating factors: that Landrigan had two prior felony convictions involving violence, and that the murder was committed for pecuniary gain. Pet. App. D-18. She rejected the State's argument that the murder was committed "in an especially heinous, cruel or depraved manner." Ariz. Rev. Stat. § 13-703(F)(6) (1990); *see* Pet. App. D-19. The judge found no statutory mitigating factors – she specifically noted that she had "received very little information concerning the defendant's difficult family history," Pet. App. D-21 – although she did treat "[l]ove of one's family" and a lack of premeditation as non-statutory mitigating factors. Pet. App. D-21 to D-22. Despite concluding that "the nature of the murder in this case is really not out of the ordinary when one considers first degree

murder," the judge imposed a death sentence. Pet. App. D-23. The Arizona Supreme Court affirmed.

C. State Post-Conviction Proceedings

Landrigan then initiated state post-conviction proceedings, which were held before the same judge who had presided over his trial and had sentenced him to death. As a prelude to filing for relief, Landrigan sought funding for an expert to help develop his claim that trial counsel had provided ineffective assistance at sentencing. JA 70. Landrigan's post-conviction counsel stated that she would need expert assistance to help establish that "substantial mitigating evidence" was not developed or presented at sentencing, including evidence about the effect of Landrigan's in utero exposure to drugs and alcohol. JA 70.

The State opposed on the ground that Landrigan had waived his right to present any mitigation evidence. JA 73. In response, Landrigan maintained that there was "additional evidence not presented to the Court" that "would explain and negate the belief that [he], through his actions, waived the right to present mitigation evidence." Reply to Response to Motion for Appointment of Expert, No. Cr. 90-66, at 1-2 (Ariz. Super. Ct. filed May 24, 1994). Landrigan also contended that "[i]t is fundamentally unfair for the State to argue that Petitioner should not receive the very assistance he needs to avoid an argument from the State that he has failed to establish a colorable claim for relief." *Id.* at 2-3.

Without discussion, the court denied Landrigan's request to appoint an expert. *See* Minute Entry, No. Cr. 90-66 (Ariz. Super. Ct. June 22, 1994)

Landrigan then filed a state post-conviction petition alleging (among other things) that his counsel had provided ineffective assistance at sentencing. *See generally Strickland v. Washington*, 466 U.S. 668 (1984) (defining ineffective

assistance as deficient performance by counsel resulting in prejudice to the defendant). Landrigan requested an evidentiary hearing to "establish his entitlement to relief on this basis," and to provide "a complete and accurate picture of [Landrigan's] background." JA 90-91, 92.[2] The request identified specific witnesses that trial counsel had not interviewed and specific mitigation evidence that trial counsel had not obtained. Landrigan alleged that Farrell had failed to develop mitigating evidence regarding his difficult family background. He noted, for example, that Farrell never contacted his adoptive sister, a registered nurse, who would have testified about Landrigan's behavioral problems. Indeed, Farrell did not interview any member of Landrigan's adoptive family. Nor did he contact Landrigan's birth father, who was on death row in Arkansas. JA 87-88.

Landrigan provided the state court with several affidavits to support his request for an evidentiary hearing and his claim for relief. One affidavit, from his adoptive sister, stated that Landrigan's adoptive mother suffered from alcoholism and that this caused "problems and difficulties in the family during [his] formative years." JA 88, 97. Landrigan also attached evidence that, as a young child, he "had uncontrollable, outbursts of temper, occasionally violent, . . . which continued throughout his childhood and became more frequent as he grew older," and he provided evidence to support his claims of fetal alcohol syndrome. JA 97. He also attached evidence of a long history of violent behavior in his biological family. Pet. App. E-2; *Hill v. State*, 628 S.W.2d 284 (Ark. 1982) (attached as Ex. 7 to Landrigan's petition for post-conviction relief).

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[2] Landrigan's request for a hearing was made pursuant to Ariz. R. Crim. P. 32.8(a), which provides: "The defendant shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses."

In addition, Landrigan provided context for his alleged "waiver" of the right to present mitigation evidence, including evidence of crises involving family members to whom he was close. He submitted evidence that at the time of the sentencing hearing his adoptive father had recently suffered a life-threatening cardiac aneurism and been confined to a wheelchair; his adoptive mother had suffered a stroke and been moved to a nursing home; and his adoptive maternal grandmother had been diagnosed with fatal leukemia. JA 97-98. These events, he contended, offered at least a "partial explanation" of his remarks at sentencing. JA 88. Landrigan also submitted an affidavit stating he would have cooperated in the submission of various types of mitigating evidence, including his biological mother's "alcohol and drug use during her pregnancy" and his "family history of violence." Pet. App. E-1 to E-2.[3]

The state court denied all relief, without providing an evidentiary hearing. The court expressed skepticism about Landrigan's Sixth Amendment claim, noting that because Landrigan "instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because [counsel] did not 'explore additional grounds for arguing mitigation evidence.'" Pet. App. F-4. The court arguably rested its decision on other grounds,

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[3] The State points to this affidavit as proof that Landrigan was willing to proceed with only a limited mitigation case focused on the genetic predisposition to violence. *See* Pet'r Br. 17, 21, 27. That assertion is incorrect. The affidavit contains no express statement by Landrigan of any intent to limit the scope of mitigation in this or any other way. Nor does the affidavit purport to set forth the mitigation case in full. In any event, the affidavit itself identifies mitigation evidence ranging beyond a genetic predisposition to violence. Moreover, pursuant to the requirements of Arizona law, Landrigan verified the state post-conviction application (and the affidavits submitted with it), JA 93, which set forth a broad-ranging mitigation case focused on Landrigan's troubled history and emotional and mental problems. JA 78-79.

however, concluding that "[n]otwithstanding the frivolous nature of the claim," Landrigan was procedurally barred from raising it in post-conviction proceedings because he had raised a claim of ineffective assistance of counsel on direct appeal. Pet. App. F-5.[4] The Arizona Supreme Court summarily affirmed.

D. Federal District Court Proceedings

Landrigan then filed an application for a writ of habeas corpus in the United States District Court for the District of Arizona. Landrigan's allegations and supporting evidence detailed the absence of any meaningful investigation by his trial lawyer and described the abundant mitigating evidence that competent counsel could have developed.

1. The Absence of Meaningful Investigation. The materials Landrigan submitted to the district court indicated that Farrell's "investigation" of mitigation evidence did not meet minimally acceptable professional standards. The principal investigation consisted of participating in brief conversations with Landrigan's birth mother and ex-wife, JA 169, and obtaining Landrigan's hospital records.[5] The investigator assigned to work with Farrell, George LaBash, spent a total of thirteen hours on the case. He spent no time developing mitigation evidence because Farrell never instructed him to do so. JA 242-43. LaBash stated that he found the experience of working with Farrell "quite frustrating." JA 242-43. Neither Farrell nor any investigator spoke with any member of Landrigan's adoptive family, JA 188-89, 192, even though Farrell had information that

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[4] The federal district court did not rely on this procedural bar, and the State has disclaimed any reliance on it in this Court. *See* Pet'r Br. 6 n.1.

[5] Landrigan's birth mother, Virginia Gipson, stated that she spent "a total of about two hours" with Farrell, that "she was never asked any questions regarding their family history," and that "she was never interviewed by any investigators before the trial." JA 169.

Landrigan's adoptive mother was an alcoholic and that there may have been problems in the home. *See* JA 244.

Landrigan's submission further revealed that Farrell had arranged for Landrigan to meet with a psychologist, Dr. Mickey McMahon. JA 247. After meeting with Landrigan "to gain a first impression and delineate the necessary next steps to be performed," JA 245, Dr. McMahon identified for Farrell a number of questions that "needed to be checked out" before he could provide a meaningful assessment. JA 245-46. Those questions were never answered because Farrell did not permit Dr. McMahon to "follow up on [his] concerns and observations in the usual and customary manner." JA 246. For instance, Farrell never authorized Dr. McMahon to conduct neuropsychological testing or to "seek information from records or significant others that might also have suggested deficits not typically seen in solely an interview." JA 246. Nor was Dr. McMahon supplied with information by the investigator, or given the opportunity to supply the investigator with information he obtained. JA 246.

Dr. McMahon averred that his "experience with Dennis Farrell was quite different from the working relationship [he] had with counsel in other death penalty cases," JA 247, where counsel and investigators worked with him to ensure that he had the information he needed to complete the psychological evaluation. Dr. McMahon eventually concluded that he "did not want to continue on the case under these conditions," and he wrote an initial report "in the hope that someone would follow up on what [he] had done, [and] even go much further." JA 247.

Although Farrell's own efforts were meager, others gave him promising leads for further investigation. For example, prior to sentencing, Farrell had received not only the report from Dr. McMahon, but also a report from a police detective

summarizing an interview with Landrigan and revealing that Landrigan had long been afflicted by delirium, tremors, and hallucinations. Attachment to State's Response to Motion to Suppress, No. Cr. 90-66, at 3 (Ariz. Super. Ct. filed Mar. 22, 1990). Farrell also had information from a pretrial competency evaluation indicating that Landrigan had a history of psychiatric hospitalization and had periodically suffered from paranoia, probably due to amphetamine abuse. Presentence Investigation, No. Cr. 90-66, at 5 (Ariz. Super. Ct. filed Oct. 26, 1990). Similarly, the hospital records Farrell submitted to the court revealed that in childhood Landrigan was a severe, "black-out" alcoholic and drug addict with no "off" button. And Landrigan's birth mother sent Farrell a letter describing Landrigan's upbringing in an alcoholic home. JA 244. Farrell did not follow up on any of this information, nor did he provide it to Dr. McMahon. JA 242-43, 246.

Finally, the record contains no evidence that Landrigan interfered with or otherwise hindered any investigation. Indeed, Landrigan expressly consented to multiple continuances to allow Farrell to gather mitigation evidence, he allowed Farrell to talk to his mother and ex-wife, he cooperated in the gathering of medical records, and he met willingly with Dr. McMahon.

2. Available Mitigating Evidence. Federal post-conviction counsel developed mitigating evidence that trial counsel failed to discover and that state post-conviction counsel could not develop because the state court denied requests for the appointment of an expert and for an evidentiary hearing.

That evidence included a declaration from Dr. Thomas C. Thompson, a psychologist who compiled a thorough neuropsychological case study of Landrigan. Dr. Thompson based that case study on a neuropsychological examination of

Landrigan, a wealth of medical, educational, criminal, and family background material gathered by federal post-conviction counsel, and extensive interviews with Landrigan's biological father, adoptive sister, ex-wife, and biological daughter, and with Landrigan himself. JA 139-41, 145-60.

Dr. Thompson's review of Landrigan's background revealed a social history "replete with individuals with seriously disordered behavior." JA 153-55. Landrigan's birth father, Darrel Hill, raped Landrigan's birth mother, fifteen-year-old Virginia Gipson (who also happened to be Hill's step-sister). Later they married, and Landrigan was born. JA 164-66. While pregnant with Landrigan, Gipson abused amphetamines, amphetamine-derivative inhalants, and alcohol. JA 155.

Hill, a violent, paranoid drug addict, physically abused Gipson and once held a gun to her head until she passed out. JA 166-67. Hill had a long history of mental illness and spent time in mental hospitals and the mental units of prisons suffering from various afflictions, including "psychosis" and "[s]chizophrenia, paranoid type." *Hill v. Lockhart*, 28 F.3d 832, 836-37 (8th Cir. 1994).

When Landrigan (whose birth name was Billy Patrick Wayne Hill) was only a few months old, Darrel Hill returned to prison and Landrigan was shuffled from one relative to another as Gipson was consumed with her drug habit and struggled to survive. JA 166-68. Finally, when Landrigan was nearly eight months old, Gipson abandoned him, ill with bronchitis and an iron deficiency, at a nursery. JA 197-200. Landrigan was then placed in foster care. JA 208-10.

He was eventually adopted by Nick and Dot Landrigan. JA 181. Dr. Thompson's report noted that Landrigan's adoptive family knew nothing of his background, and Landrigan's "early attachment difficulties were amplified in

his adoptive family as a result of the adoptive mother's affective disturbances and chronic alcoholism." JA 148, 162. His mother routinely consumed a fifth of vodka a day, drinking until she passed out. JA 184. She would frequently slap Landrigan, and she even "hit [him] with a frying pan hard enough to leave a dent." JA 183.

Landrigan's teachers and other acquaintances attested to these circumstances and to his behavioral difficulties. JA 193-95, 216-19, 220-21, 222-24, 225-27, 228-30, 231-36, 237-38. Reared in a chaotic home environment, Landrigan developed severe drug and alcohol problems. JA 132, 217-18, 223, 225-26, 229. In middle school, he blacked out in class and had to be sent to the hospital to have his stomach pumped. JA 237.

One month before his fifteenth birthday, Landrigan was admitted to a hospital psychiatric unit and given psychotropic medication. JA 51, 148. Shortly thereafter, Landrigan was placed in a local boys' home. JA 185; Rule 7 Motion, No. 96-2367 at Ex. 30, at 1 (D. Ariz. filed Nov. 17, 1998). When he was sixteen, he was placed at a correctional facility for juveniles. JA 228; Rule 7 Motion at Ex. 30 at 1. When out of these facilities, Landrigan had frequent run-ins with the police, often for alcohol-related reasons. JA 185; Rule 7 Motion at Ex. 30 at 1. When Landrigan was sixteen, his parents called an ambulance because he would not awaken after a drinking contest. JA 186-87.

In 1980, Landrigan was admitted to a substance abuse treatment center in Austin, Texas. There he met up with Sandy Martinez, a high school friend and fellow drug abuser. They were married in 1981, but within three weeks Landrigan returned to prison to serve time for drug possession. JA 231-32. After he was released from prison, Landrigan and his wife did not work; they drank alcohol and abused drugs. JA 232-33.

Soon thereafter, Landrigan returned to an Oklahoma prison after a conviction for a stabbing following a drunken fight with a friend. JA 234, 229. He escaped and ultimately arrived in Arizona. At the time of the present crime, Landrigan had used amphetamines for forty-two straight days and had slept only about fourteen of those days. JA 133.

3. Requests for Evidentiary Development. Landrigan requested an evidentiary hearing to ensure that the district court would have before it all of the evidence necessary to evaluate his Sixth Amendment claim. In addition to evidence supporting the absence of an effective investigation, Landrigan intended to offer the testimony of Dr. Thompson and others. Dr. Thompson would have explained Landrigan's organic brain dysfunction, which predated the crime; Landrigan's family history; the genetic factors and the in utero exposure to alcohol that contributed to Landrigan's neurobiological dysfunction; and Landrigan's limited ability to assist in his own defense at trial and sentencing. Dr. Thompson would also have offered a more thorough and detailed explanation of Landrigan's brain impairment and its subsequent effects on his behavior. JA 115-23, 125-27.

Landrigan also moved to expand the record, pursuant to Habeas Rule 7, to include a broad array of exhibits, including declarations by experts, individuals with knowledge of the proceedings in state court, members of Landrigan's birth and adoptive families, and a variety of acquaintances. JA 139-95, 216-43, 245-48; *see also* JA 161-62 (depicting family trees). A variety of other records – most of which were in existence at the time of Landrigan's trial – were also included with the motion. *See, e.g.*, JA 196-215, 244, 249-56.

4. The District Court Decision. The district court acknowledged that "[n]o evidentiary hearing was held on the merits of this claim in state court, although [Landrigan] requested an evidentiary hearing on more than one occasion."

It also recognized that "28 U.S.C. § 2254(e)(2) does not prevent the Court from exercising its discretion and granting Petitioner an evidentiary hearing" on his claim. Pet. App. C-46. The court refused to conduct a hearing and ultimately denied relief, however, because it concluded that Landrigan had "not set forth a colorable claim of ineffective assistance of counsel." Pet. App. C-46.

Without deciding whether counsel's performance had been deficient or whether Landrigan had waived the presentation of mitigation evidence, the district court held that Landrigan failed to demonstrate prejudice. In the court's view, the "evidence of [Landrigan's] troubled background, his history of drug and alcohol abuse, and his family's history of criminal behavior" did not create "a reasonable probability that the result of the [sentencing] proceeding would have been different" had the evidence been presented. Pet. App. C-22.

In making that determination, however, the district court considered only a subset of the evidence that Landrigan had presented in mitigation. That was because the district court concluded – erroneously, as the Ninth Circuit later held, *see infra* p. 18 – that consideration of much of Landrigan's mitigation case, including the material relating to fetal alcohol syndrome and mental and organic impairments, was subject to a procedural bar. The court therefore refused to expand the record to allow such evidence to be considered. *See* Pet. App. C-13 to C-18. The district court held, for example, that "[t]he expert testimony [Landrigan] hopes to develop relating to [his] organic brain dysfunction . . . cannot be properly considered by this court" because of procedural default. Pet. App. C-45 to C-46.

E. Ninth Circuit Panel Opinion

A panel of the Ninth Circuit affirmed. Addressing Landrigan's Sixth Amendment claim on the merits, the panel

recognized that the investigation conducted by trial counsel "appears to have been rather asthenic." Pet. App. B-10. It likewise recognized that any purported waiver of the right to present mitigation evidence was not dispositive because there was at least the possibility that a "more thorough" investigation would have given Landrigan "more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented." Pet. App. B-10. However, focusing only on the evidence that the district court had considered, and ignoring all of the other evidence proffered below, the panel concluded that Landrigan had not met *Strickland*'s prejudice prong because the evidence in question, although mitigating "in some slight sense," would "also have shown the court that it could anticipate that [Landrigan] would continue to be violent." Pet. App. B-12. The panel then concluded – in a footnote and without analysis – that "the district court did not abuse its discretion when it determined that an evidentiary hearing was not required." Pet. App. B-13 n.7.

F. The Ninth Circuit En Banc Opinion

The Ninth Circuit granted Landrigan's petition for en banc review and, in a 9-2 decision, remanded to the district court solely to conduct an evidentiary hearing.[6] Contrary to the State's contentions, the en banc court did not grant relief based on a finding "that the state court unreasonably determined the facts," or on a finding "that the state court's rejection of Landrigan's ineffective assistance of counsel claim was contrary to . . . clearly established federal law." Pet'r Br. 12. Instead, the court concluded that Landrigan was

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[6] Judge Wardlaw joined the panel opinion denying Landrigan relief and also served on the en banc panel. Judge Wardlaw ultimately joined the en banc majority, which, after considering all of the evidence – including the evidence that the district court erroneously excluded – determined that Landrigan was entitled to an evidentiary hearing.

entitled to develop his claim through an evidentiary hearing because he had "made a colorable claim that he did not receive effective assistance of counsel in his sentencing." Pet. App. A-7. The court emphasized that it was "not opining on what the district court's ultimate resolution" of the claim should be. Pet. App. A-21.

In reaching that narrow conclusion, the en banc majority first determined that the limitation on evidentiary hearings set forth in 28 U.S.C. § 2254(e)(2) did not foreclose a hearing here. Landrigan had requested both an appointment of an expert and an evidentiary hearing in state court to develop his Sixth Amendment claim, and the state court had denied those requests. Pet. App. A-8, A-9. Because Landrigan had "tried and failed, through no fault of his own, to develop the facts supporting his ineffectiveness claim at the state-court level," § 2254(e)(2) did not bar a hearing on his federal habeas claim. Pet. App. A-9 (applying *Michael Williams v. Taylor*, 529 U.S. 420 (2000)).

The court then considered whether Landrigan had alleged a "colorable claim" under *Strickland*. All eleven members of the en banc court concluded that Landrigan had presented a colorable claim that his counsel's performance had been deficient. *See* Pet. App. A-12 (majority opinion) (expressing "grave doubts whether Landrigan received effective assistance of counsel"); Pet. App. A-22 (Bea, J., dissenting) ("agree[ing] with the majority's conclusion that counsel's limited investigation fell below the standards of professional representation prevailing in 1990"). As the majority noted, based upon the existing record, "it appears that counsel did little to prepare for the sentencing aspect of the case." Pet. App. A-10. Moreover, despite his lack of effort, trial counsel had been told about "potential mitigating evidence, but that evidence was not developed." Pet. App. A-11. Particularly in light of Landrigan's "alleg[ations] that with some minimal

investigation, [trial counsel] could have uncovered Landrigan's tortured family history," Landrigan's claim of deficient performance was at least colorable. Pet. App. A-11 to A-12, A-17.

The Ninth Circuit likewise concluded – without dissent – that Landrigan's purported "waiver" of his right to present mitigation evidence did not foreclose his Sixth Amendment claim. First, nothing in the record before the court indicated that Landrigan's statement, even if read as a broad waiver, was knowing and intelligent, particularly in light of counsel's failure to develop the mitigation evidence necessary to allow Landrigan to make an informed decision. Pet. App. A-16. And second, any reading of Landrigan's waiver as extending beyond the presentation of testimony from his mother and ex-wife "is not supported by the record." Pet. App. A-15 to A-16.

The court of appeals then addressed prejudice. The majority held at the outset that the district court had erred in excluding "additional facts proffered by Landrigan" on the ground of procedural bar. Pet. App. A-18 to A-19. With that error corrected, the court noted that the record as a whole revealed "a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge." Pet. App. A-19 (describing evidence). Considering both the mitigating evidence adduced at trial and *all* of the evidence alleged in the habeas proceedings, the majority then concluded that Landrigan's allegations, "[i]f true, . . . are the very sort of mitigating evidence that might well have influenced the [judge's] appraisal of [Landrigan's] moral culpability." Pet. App. A-19 (internal quotation marks omitted). Thus, there was a "reasonable probability" that a

factfinder, presented with all of the evidence, would have reached a different conclusion. Pet. App. A-21.[7]

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that Landrigan "has demonstrated a proper basis for an evidentiary hearing" on his Sixth Amendment claim, Pet. App. A-21, is correct and should be affirmed.

In its present posture, this case presents no issue relating to the limitations imposed on federal habeas corpus proceedings by 28 U.S.C. § 2254(d). That provision governs the ultimate question whether a federal habeas court should grant relief. The threshold question whether to afford a habeas petitioner an evidentiary hearing – the question here – is governed by different standards that are quite straightforward. The petitioner must demonstrate that he did not "fail[] to develop the factual basis of his claim" in the state courts, 28 U.S.C. § 2254(e)(2),[8] and must allege facts which, if proved, would entitle him to relief.

Landrigan easily meets those requirements. As the en banc Ninth Circuit held – and the State effectively concedes – § 2254(e)(2) does not preclude a hearing because Landrigan diligently sought, and was denied, the opportunity to make his factual case in state post-conviction proceedings. *See Michael Williams v. Taylor*, 529 U.S. at 432, 435-37.

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[7] Judges Bea and Callahan dissented. In their view, the new mitigation evidence proffered by Landrigan did not suffice to show a reasonable probability that the sentencing decision would have been different. Pet. App. A-22 to A-27.

[8] A habeas petitioner who has "failed to develop" the factual basis for the claims asserted in the petition can still obtain an evidentiary hearing in federal court upon meeting the stringent additional requirements set forth in § 2254(e)(2). Those requirements are not at issue in this case.

Similarly, Landrigan has pled a colorable Sixth Amendment claim under the well-established *Strickland* standard. All members of the Ninth Circuit en banc court agreed that Landrigan has alleged facts that, if proven, would establish his trial counsel's deficient performance under *Strickland*. Trial counsel undertook virtually no effort to develop a mitigation case. He failed to prepare a comprehensive psychological evaluation and social history, failed to interview family members, and ignored numerous promising leads suggesting the existence of a powerful mitigation case. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Landrigan has likewise alleged a colorable claim of prejudice. The powerful mitigating evidence developed by federal post-conviction counsel – evidence of a troubled history and serious emotional and mental problems – is precisely the kind of evidence that is most relevant to assessing a defendant's moral culpability at sentencing. *Wiggins*, 539 U.S. at 535; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

Contrary to the State's contention, Landrigan cannot be denied an evidentiary hearing based on any purported "waiver" of his right to present mitigation evidence at the sentencing hearing. Landrigan has set forth a colorable claim that any such "waiver" was itself the direct result of trial counsel's deficient performance. Even apart from counsel's deficient performance, Landrigan has alleged that any purported waiver was not knowing and intelligent, and that he intended at most to forgo his right to put on his ex-wife and birth mother as witnesses. If Landrigan can prove his allegations, then his comments at sentencing will pose no bar to relief.

At bottom, the State is asking this Court to conclusively deny Landrigan's claim without granting him any opportunity to prove facts that would entitle him to relief.

Such a result cannot be squared with the choices Congress made in § 2254, with this Court's decision in *Michael Williams*, or with the bedrock principle that where a habeas petitioner sets forth a colorable claim to relief, "'it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (Rehnquist, C.J.), (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). In particular, nothing in § 2254(d) supports the State's effort to pretermit consideration of Landrigan's claim. Until Landrigan has been afforded an evidentiary hearing, it is impossible to know how, or even if, the deferential standards set forth in that provision will apply to Landrigan's claim. And even if they do apply, "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("*Miller-El I*"). As this Court has stressed, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Id.*

Thus, the right result in this case is for the evidentiary hearing ordered by the Ninth Circuit to proceed. At that hearing, Landrigan's allegations can be put to the test, and the district court can make a reliable determination respecting Landrigan's Sixth Amendment claim. It would be manifestly unjust – as well as contrary to every applicable legal principle – to deny Landrigan the opportunity he was denied in state court to prove his entitlement to relief.

ARGUMENT

I. The Only Question Before This Court Is Whether the En Banc Ninth Circuit Erred in Granting Landrigan an Evidentiary Hearing.

Treating the decision below as a final judgment on the merits, the State devotes its entire brief to contending that the Ninth Circuit applied § 2254(d) incorrectly because the en banc court of appeals was insufficiently deferential to the state court decision rejecting Landrigan's claim. That argument is misdirected. Section 2254(d) prescribes standards for determining when a federal habeas application can "be granted." 28 U.S.C. § 2254(d). At this early stage in the proceedings, the Ninth Circuit has not "granted" relief on any claim in Landrigan's application; it has not instructed the district court to grant relief on any claim in Landrigan's application; and it has not determined that any claim in Landrigan's application warrants a grant of relief.

In the judgment under review, the Ninth Circuit simply took the preliminary step of remanding for an evidentiary hearing. The court did so to ensure that the merits of the Sixth Amendment claim will not be decided without a factual record that permits a reliable determination (under the appropriate standard for granting relief) of whether Landrigan's trial counsel performed below minimally acceptable levels, whether that performance prejudiced Landrigan, and what effect, if any, Landrigan's colloquy at the sentencing hearing has on his claim. These are intensely factual issues, and the record with respect to each of them is incomplete. The Ninth Circuit thus appropriately insisted on further evidentiary development.

In ordering a hearing, the Ninth Circuit scrupulously followed the governing law. The source of an affirmative right to an evidentiary hearing is 28 U.S.C. § 2243, which provides that "[w]hen the writ or order is returned a day shall

be set for hearing" and "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.*; *see also* Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") (providing that "[i]f the petition is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted to determine whether an evidentiary hearing is warranted," and must conduct any hearing with "regard for the need of counsel for both parties for adequate time for investigation and preparation"). This Court has explicated the standard for granting such a hearing in *Townsend v. Sain*, 372 U.S. 293 (1963), and other decisions. In 1996, Congress placed certain express statutory limits on the availability of federal evidentiary hearings where the petitioner has "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Congress did not otherwise alter the law governing evidentiary hearings. Subject only to the limitations of § 2254(e)(2), the standard articulated in this Court's decisions continues to govern.

In this case, the Ninth Circuit first analyzed § 2254(e)(2) and determined that it did not forbid an evidentiary hearing for Landrigan, because he had been denied the opportunity to develop the factual basis of his claim in state court. The Ninth Circuit then applied the test set forth in this Court's cases and determined that Landrigan "alleged facts that, if demonstrated to be true, present a colorable claim that he received ineffective assistance of counsel in his capital sentencing proceeding." Pet. App. A-21.

As will be shown below, the court's decision to order an evidentiary hearing is unimpeachable. Indeed, the Ninth Circuit's decision is consistent not only with the specific standards governing habeas corpus but also with the general principle that a federal court should inform itself reliably

about the facts it needs to make a responsible decision on constitutional questions. *See, e.g.*, *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938); *see also Tamayo-Reyes*, 504 U.S. at 24 (Kennedy, J., dissenting) ("We ought not to take steps which diminish the likelihood that [federal] courts will base their legal decision on an accurate assessment of the facts.").

In seeking to bypass this factual development and obtain a definitive ruling from this Court on the ultimate merits of Landrigan's Sixth Amendment claim, the State's arguments are precipitate. The State seeks to blur the distinction between the threshold inquiry into whether Landrigan is entitled to further process and the ultimate merits inquiry into whether Landrigan is entitled to relief, an inquiry that cannot be carried out until the requisite process is complete. In this respect, the present case parallels *Miller-El v. Cockrell*, 537 U.S. 322 (2003). There, the state contended that the court of appeals had properly denied a certificate of appealability (*see* 28 U.S.C. § 2253(c)) on Miller-El's challenge to the prosecution's use of race-based peremptory challenges, because Miller-El ultimately would "not be able to satisfy his burden" under § 2254(d) and § 2254(e)(1) of overturning the state court's credibility findings respecting the prosecution's motives. 537 U.S. at 348. Reversing, this Court held that the decision whether to issue a certificate of appealability "is not the occasion for a ruling on the merit of petitioner's claim." *Id.* at 331. Because Miller-El readily met the applicable threshold test, his appeal was allowed to proceed. *See id.* at 327 (granting certificate of appealability because "jurists of reason could . . . conclude the issues presented are adequate to deserve encouragement to proceed further").

Analogous reasoning applies here. At this preliminary stage, the question is not whether Landrigan's Sixth Amendment claim warrants relief under the appropriate standard of review. The only question now is whether the

Ninth Circuit overstepped any rule of habeas corpus practice or propriety in concluding that Landrigan should be given "careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts," *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977) (quoting *Harris*, 394 U.S. at 298) (internal quotation marks omitted), before the district court or the court of appeals decides the merits of the Sixth Amendment issue presented but unclearly delineated by a record that the state courts prevented Landrigan from developing. On that question, the State's brief is silent, offering no reason for overturning the Ninth Circuit's decision.

II. The Ninth Circuit Correctly Held that Landrigan Should Receive an Evidentiary Hearing.

A. Section 2254(e)(2) Permits an Evidentiary Hearing in Landrigan's Case.

Section 2254(e)(2) does not bar an evidentiary hearing in this case. That provision restricts the availability of a hearing only where "the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In *Michael Williams v. Taylor*, 529 U.S. 420 (2000), the Court unanimously held that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. The existence of "[d]iligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court," and "will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 435, 437.

Here, as the en banc Ninth Circuit held in a careful application of *Michael Williams*, Landrigan's post-conviction

counsel displayed the requisite diligence by investigating the Sixth Amendment claim and seeking expert assistance and an evidentiary hearing in the state courts. Pet. App. A-8. Landrigan therefore cannot be said to have "failed to develop the factual basis" of his claim. The State did not contend otherwise in its petition for certiorari or its opening brief in this Court. Nor did the State argue to the Ninth Circuit that § 2254(e)(2) precluded an evidentiary hearing in Landrigan's case. Accordingly, § 2254(e)(2) cannot be a ground for reversal.

B. Under the "Colorable Claim" Standard, Landrigan Is Entitled to an Evidentiary Hearing if He Can Show that Further Evidentiary Development Might Affect the Resolution of His Claim.

Because Landrigan did not have the opportunity for factual development in State court despite his diligence, he is entitled to a federal evidentiary hearing if he has stated a "colorable claim." *See* Pet. App. A-21 (applying standard). Like other courts of appeals, the Ninth Circuit uses "colorable claim" as shorthand for the standard set forth in this Court's decisions: whether the habeas applicant has alleged facts which, if proved, would entitle him to relief. *See* Habeas Rule 8 Advisory Committee Notes (discussing standard); *Hill v. Lockhart*, 474 U.S. 52, 62-63 (1985) (White, J., concurring); *Townsend*, 372 U.S. at 312.[9] This

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[9] In setting forth circumstances in which a federal hearing was mandatory, *Townsend* required that the petitioner not only allege a colorable claim, but also make any one of six showings, one of which was that "the material facts were not adequately developed at the state-court hearing." 372 U.S. at 313. A sharply divided Court modified the standard in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), to mandate an evidentiary hearing in this circumstance only if the habeas petitioner could show "cause" (in the sense that the failure to develop the facts in the state proceedings was not attributable to the petitioner). *Id.* at 11.

standard implements the well-established principle that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (Rehnquist, C.J.) (quoting *Harris*, 394 U.S. at 300).

The essential question is whether an evidentiary hearing is needed to ensure that a properly informed decision will be made on the constitutional issues presented in a habeas petition, where the facts necessary to frame and resolve those issues have not been developed in the state courts, through no fault of the petitioner. There is such a need when a habeas petition and the state court record put material facts in issue that cannot be adjudicated without additional factual development and presentation. *See, e.g.*, *Michael Williams*, 529 U.S. at 444-45; *Blackledge*, 431 U.S. at 75-78, 82-83 (holding that a federal habeas petition could not be dismissed without fact development and adjudication when its allegations "were not in themselves so 'vague [or] conclusory,'" "so 'palpably incredible,' . . . [or] so 'patently frivolous or false' . . . as to warrant summary dismissal," and explaining that, having made a colorable claim, the petitioner was "'entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts'"); *Machibroda v. United States*, 368 U.S. 487, 492-96 (1962); *Tamayo-Reyes*, 504 U.S. at 23-24 (Kennedy, J., dissenting) (stressing the need for a pragmatic inquiry into whether "an evidentiary hearing will make a difference in the outcome").

When Congress enacted AEDPA in 1996, it codified in § 2254(e)(2) the "cause" component of the *Tamayo-Reyes* standard. *See Michael Williams*, 529 U.S. at 434. As discussed above, Landrigan has demonstrated the requisite diligence to avoid the § 2254(e)(2) restriction.

This standard is reflected in a long line of this Court's cases. Notably, like Landrigan, the habeas petitioners in many of these cases sought a federal evidentiary hearing to substantiate allegations that an apparent waiver of their fundamental rights was invalid or did not otherwise bar relief – and this Court affirmed their right to further proceedings on that issue. *See, e.g.*, *Blackledge*, 431 U.S. at 75-78, 82-83 (permitting a claim of improper inducement of a guilty plea to proceed despite petitioner's representation to the state court at the time of the plea that the plea was voluntary and understanding); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (ordering a hearing on post-conviction claims that the petitioner's confession, waiver of counsel, and guilty plea were the product of coercion, despite a plea colloquy in which he had stated that these were voluntary and understanding and that he was factually guilty; procedures such as plea colloquies are intended "to flush out and resolve all such issues, but like any procedural mechanism, . . . [their] exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations"); *Boyd v. Dutton*, 405 U.S. 1, 3 (1972) (ordering a hearing on whether the "petitioner knowingly and voluntarily waived his constitutional right to counsel before entering a guilty plea in the state trial court"); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 120-21 (1956) (explaining that "[t]he allegations as to petitioner's treatment prior to confession and his understanding of the nature and consequences of a guilty plea present the very kind of dispute which should be decided only after a hearing," even though "the trial record shows that petitioner told the judge that he was guilty and said 'I throw myself at the mercy of the court'"); *United States ex rel. McCann v. Adams*, 320 U.S. 220, 221 (1943) (per curiam) ("[T]he relator filed a petition for a writ of habeas corpus in the District Court which, with supporting

affidavits, adequately raised the issue whether in fact he intelligently – with full knowledge of his rights and capacity to understand them – waived his right to the assistance of counsel and to trial by jury. . . . It is a claim which the relator should be allowed to establish, if he can. We cannot say that, in the light of the supporting affidavits, the petition for a writ of habeas corpus was palpably unmeritorious, and should have been dismissed without more.").[10]

Although the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") altered the standards for obtaining an evidentiary hearing in other respects (in § 2254(e)(2)), nothing in AEDPA modified this well-established case law. Congress did not impose restrictions other than those in § 2254(e)(2) on the power of a federal habeas court to order a hearing, and Congress has never changed the longstanding colorable claim standard. Accordingly, that standard continues to govern. *See, e.g., Astoria Fed. Sav. & Loan*

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[10] *See Blackledge*, 431 U.S. at 74 n.4 (relying on *Fontaine* and *McCann* in interpreting § 2254); *see also, e.g., Humphrey v. Cady*, 405 U.S. 504, 517 (1972) (holding that petitioner's claim that he did not knowingly and intelligently waive his rights required an evidentiary hearing); *Walker v. Johnston*, 312 U.S. 275, 284-87 (1941) (explaining "that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined" at a hearing, and that the pleadings did raise a "material issue of fact" where petitioner alleged that he did not "knowingly waive" his right to counsel, even though the government contended that his allegations were improbable); *Waley v. Johnston*, 316 U.S. 101, 102-05 (1942) (per curiam) (requiring a hearing because "[i]f the allegations are found to be true, petitioner's constitutional rights were infringed" on the ground that his guilty plea was coerced). *See generally Vasquez v. Hillery*, 474 U.S. 254, 258 (1986); *Procunier v. Atchley*, 400 U.S. 446, 451 (1971); *Townsend*, 372 U.S. at 312; *Mattox v. Sacks*, 369 U.S. 656, 657 (1962); *Massey v. Moore*, 348 U.S. 105, 106-09 (1954) ("On the present pleadings we must take as true the allegation of mental incapacity at the time of the trial. . . . We do not intimate an opinion on the merits, for we do not know what facts the hearing will produce.").

Ass'n v. Solimino, 501 U.S. 104, 108 (1991); *United States v. Texas*, 507 U.S. 529, 534 (1993); *see also J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001).[11]

To be sure, § 2254(e)(1) may influence the standard of proof a habeas petitioner must meet at an evidentiary hearing, and § 2254(d) may limit the habeas court's power to grant relief after the evidence has been received and evaluated. But the appropriate inquiry at the Habeas Rule 8 stage remains a threshold one. As this Court made clear in *Michael Williams*, a petitioner who has been denied the opportunity to make a state court record as to a constitutional claim, despite any lack of diligence or other fault, should be given a federal evidentiary hearing – his *first and only* chance to develop and prove the relevant facts – if the underlying claim is potentially viable. *See Michael Williams*, 529 U.S. at 442 (allegations that juror and counsel failed to reveal relationship to each other and to prosecution witness "disclose the need for an evidentiary hearing," since "[i]t may be that petitioner could establish that [the juror] was not impartial . . . or that [counsel's] silence so infected the trial as to deny due process"). Sections 2254(d) and (e)(1) are relevant, to the extent that the record following an evidentiary hearing indicates they are applicable at all, only in that they inform the post-hearing determination whether a petitioner is entitled to relief on the merits. If the allegations are sufficient to establish the potential for such entitlement, then there is "a realistic possibility that an evidentiary

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[11] The courts of appeals continue to grant evidentiary hearings where a petitioner has pled facts that, if proven, would entitle him to relief, in cases in which § 2254(e)(2) does not otherwise bar an evidentiary hearing. *See, e.g., Barkell v. Crouse*, 468 F.3d 684, 696-98 (10th Cir. 2006); *Fullwood v. Lee*, 290 F.3d 663, 680-82 (4th Cir. 2002); *Matheney v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001).

hearing will make a difference in the outcome." *Tamayo-Reyes*, 504 U.S. at 24 (Kennedy, J., dissenting); *see also Townsend*, 372 U.S. at 322; *cf. Miller-El I*, 537 U.S. at 327 (cautioning against an overly rigorous threshold inquiry in the COA context and asking whether "jurists of reason could . . . conclude the issues presented are adequate to deserve encouragement to proceed further").

The "colorable claim" standard embodies a recognition that evidentiary hearings can make a critical difference in the discrete circumstances in which they are appropriate.[12] Incarcerated petitioners are obviously hampered in their ability to investigate the facts. And discovery in § 2254 proceedings is not available as a matter of course (as it would be in most civil cases). *See Bracy*, 520 U.S. at 904; *Harris v. Nelson*, 394 U.S. 286, 300 (1969). Typically, no discovery is permitted until entitlement to an evidentiary hearing has itself been established. *See, e.g.*, Habeas Rule 6 Advisory Committee Notes. Accordingly, the hearing is not simply a matter of parading previously examined witnesses before the habeas court. Rather, subpoenaed witnesses may well present their evidence in a surprisingly powerful (or weak)

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[12] Evidentiary hearings can serve to air otherwise concealed facts that vindicate federal constitutional claims (*see, e.g., Banks v. Dretke*, 540 U.S. 668 (2004)), or definitively scupper them (*see, e.g., McKleskey v. Zant*, 499 U.S. 467 (1991)). Notably, however, few federal habeas cases actually merit an evidentiary hearing. Typically, a petition is dismissed as insubstantial on its face (*see* Habeas Rule 4), or a prisoner has already received an evidentiary hearing in state court or has forfeited any entitlement to a hearing pursuant to § 2254(e)(2). *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* 35 n.26, 887 n.3 (5th ed. 2005) (reporting that pre-AEDPA statistics show that "district courts hold [evidentiary] hearings in only 1.17% of all habeas corpus cases"); Roger A. Hanson & Henry W.K. Daly, Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Habeas Corpus Review* 17 (1995) (stating that 63% of issues raised by habeas petitioners in pre-AEDPA cases in the courts studied were dismissed).

fashion, or come forward with helpful information that could not have been developed previously.

Where a habeas petitioner asserts a denial of the Sixth Amendment right to effective assistance of counsel under the *Strickland* standard, the need for evidentiary development can be particularly acute. Most of the relevant evidence will typically relate to "occurrences outside the courtroom" upon which the trial record "could ... cast no real light." *Machibroda*, 368 U.S. at 494-95. In particular, an evidentiary hearing may be the first time that trial counsel – whose conduct is necessarily impugned by the constitutional claim presented, and whose testimony is usually critical – will be heard from at all, let alone cross-examined. In addition, the *quality* of witnesses' testimony – their demeanor, their credibility, the impact of what they say – is especially important in making the sensitive, fact-specific determination whether there is a reasonable probability that the presentation of the evidence in the first instance would have averted the imposition of the death penalty. *See, e.g.*, *Wingo v. Wedding*, 418 U.S. 461, 474 (1974). As Justice Kennedy observed for a unanimous Court in *Massaro v. United States*, 538 U.S. 500 (2003), the "trial record [is] not developed precisely for the object of litigating or preserving" an ineffective assistance claim and is "thus often incomplete or inadequate for this purpose. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id.* at 504-05.

C. Landrigan Has Advanced a Colorable Claim of Ineffective Assistance of Counsel.

Landrigan has pleaded a colorable claim for relief that cannot be resolved solely on the basis of the state court record. He asserts that he was denied his Sixth Amendment right to effective assistance of counsel under the clearly

established law of *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Terry Williams v. Taylor*, 529 U.S. 362 (2000). Under *Strickland*, a criminal defendant establishes an entitlement to relief by proving that trial counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

The facts alleged and the limited evidence adduced thus far support the conclusion that Landrigan's trial counsel put minimal effort into investigating possible avenues of mitigation, ignored obvious clues pointing to sources of mitigating evidence, and ultimately had ready only a paltry mitigation case consisting of testimony from Landrigan's mother and ex-wife. *See Wiggins*, 539 U.S. at 523-26. The facts alleged and the limited evidence adduced thus far also support Landrigan's contention that there is, at a minimum, a reasonable probability the outcome at sentencing would have been different had competent counsel prepared and presented the available but undeveloped mitigation evidence. *See Terry Williams*, 529 U.S. at 393-96. As the en banc Ninth Circuit held, the allegations and evidence presented thus far are of exactly the kind that could influence a sentencer to impose a sentence of life imprisonment rather than death. Pet. App. A-19.

In the same vein, the allegations and evidence presented thus far support the conclusion that Landrigan did not validly waive his right to present mitigation evidence. As the court of appeals indicated, the transcript of the colloquy between Landrigan and the state trial judge (which is the sole "evidence" on which the State's waiver argument rests) does not document a knowing and intelligent waiver of

Landrigan's right to put on mitigation evidence, or even establish what Landrigan thought he was giving up. There can be no reliable determination that this colloquy effected a valid waiver without knowing what Landrigan's trial counsel had actually done to prepare a mitigation case, what Landrigan's trial counsel had told him about the nature of the proceedings and the evidence and arguments he would be forgoing if he did not put on a mitigation case, and what Landrigan understood and intended to communicate in response to the trial judge's questions. The present record does not contain anything approaching informative answers to those questions – all of which (at a minimum) must be answered before a reliable final determination can be made respecting the effect of Landrigan's statements during the colloquy.

The State's principal response is that § 2254(d) bars Landrigan from obtaining relief. Yet it is far from clear whether that provision will apply *at all* to the ultimate resolution of Landrigan's substantive Sixth Amendment claim. In any event, § 2254(d) and (e)(1) provide no basis for denying Landrigan an evidentiary hearing at this juncture, even if they will ultimately apply to his ineffective assistance claim. As this Court has made clear, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340. Likewise, "[d]eference does not by definition preclude relief." *Id.* Thus, even where AEDPA applies, "[a] federal court can disagree" with a state court's determination and "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* No aspect of the state court's decision on Landrigan's Sixth Amendment claim can be given dispositive effect at this stage. If Landrigan can prove his allegations to the satisfaction of the federal habeas court under the appropriate standard, he will be entitled to relief. Because he was denied

the opportunity to develop the factual basis of his claim in the state courts, the Ninth Circuit correctly ruled that he should be given that opportunity in federal court.[13]

1. Trial Counsel's Deficient Performance.

Further evidentiary development is warranted to determine whether the performance of Landrigan's trial counsel was deficient. As both the majority and the dissent in the en banc Ninth Circuit recognized, the present incomplete record strongly suggests that Landrigan's trial counsel failed to conduct a minimally adequate investigation prior to sentencing. Pet. App. A-10, A-12 (statement by the

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[13] The potential applicability of § 2254(d) to the several issues bearing on Landrigan's Sixth Amendment claim – (a) substandard performance, (b) prejudice under *Strickland*, and (c) the State's contention of "waiver" – cannot be untangled or resolved before the hearing ordered by the court of appeals has further developed the facts bearing on all of these issues and their interrelationships. Depending on the course of the evidentiary hearing, it is certainly possible that § 2254(d) will not apply at all, or will apply only in a limited way. *See generally Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam) (noting that, where "new evidence" is presented in a federal evidentiary hearing, de novo review may be proper under "the theory that there is no relevant state-court determination to which one could defer"); *Terry Williams*, 529 U.S. at 394-96 (reviewing deficient performance under *Strickland* de novo because the state court did not decide the issue); *Wiggins*, 539 U.S. at 534 (reviewing prejudice under *Strickland* de novo because the state court did not decide the issue); En Banc Ninth Cir. Oral Argument, No. 00-99011, *available at* http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1 ("Ninth Cir. Oral Argument Audio") at 43:55-44:30 (State's concession that there were no state court findings about whether Landrigan would have cooperated with a broader investigation); *id.* at 50:30-51:20 (State's concession that there were no state court findings about whether Landrigan's proffered mitigation evidence had merit: "You're right. There's not an express statement addressing each of the merits . . . ."). This Court need not and should not decide these issues now. Rather, they should be decided after the factual record has been fully developed.

majority that "it appears that Landrigan's counsel did little to prepare for the sentencing aspect of the case"); Pet. App. A-22 (statement by the dissenters that they "agree[d] . . . that counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990"). Landrigan's district court pleadings and supporting affidavits assert that trial counsel "did not contact Landrigan's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding Landrigan's upbringing in his adoptive home." Pet. App. A-11. Indeed, the sentencing judge herself noted that she had "received very little information concerning the defendant's difficult family history." Pet. App. D-21.

What little trial counsel did appears to have been slipshod. For example, although Farrell retained a psychologist – Dr. McMahon – to do a preliminary examination of Landrigan, McMahon explained by affidavit that he was "not able to follow up on my concerns and observations in my usual and customary manner," and that he informed Farrell that "much more work was needed to provide an appropriate psychological study for a death penalty case." JA 246. In response, Farrell told him "simply [to] write up [his] impressions." JA 247. Dr. McMahon's affidavit concluded that "[m]y experience with Dennis Farrell on this case was quite different from the working relationship I had with counsel on other death penalty cases in which the psychological study went through a series of steps . . . and plans for further investigation . . . . None of this occurred with Mr. Farrell." JA 247. Similarly, although Farrell employed an investigator, the investigator stated in an affidavit that he did not investigate mitigation because Farrell did not instruct him to do so, he spent virtually no time on the case, and he found his lack of interaction with Farrell "quite frustrating." JA 242-43.

Seeking to blame Landrigan for trial counsel's performance, the State asserts that he "actively thwarted his attorney's efforts to develop . . . mitigation evidence." Pet'r Br. i. No court in this case has made any such finding, and no evidence in the record of any proceeding thus far supports any such conclusion. *See, e.g.*, Ninth Cir. Oral Argument Audio at 43:55-44:30 ("[Judge Kozinski]: There's no [state court] finding at all even by inference as to investigation? There's . . . no finding that . . . the trial court made that goes to Landrigan's attitude about allowing his lawyer to investigate? . . . [Counsel for State]: I would agree."). On the contrary, Landrigan agreed to three continuances for the express purpose of developing mitigation and submitted to an initial psychological examination by Dr. McMahon. *See supra* pp. 3, 11.

Perhaps for that reason, the State suggests that Landrigan's comments *on the day of the sentencing hearing* should be construed as constraining counsel's ability to investigate. Pet'r Br. 21-22. But those comments obviously could not have hamstrung counsel's investigation *before* the hearing. The State therefore seeks to portray the hearing as a preliminary event that would have been followed by additional investigation, had Landrigan not obstructed it. *See id.* Once again, the present record does not support that assertion. By the time of the sentencing hearing, the parties had submitted sentencing memoranda setting forth their arguments for aggravation and mitigation, respectively. Pet. App. D-2, D-13. Moreover, in seeking three continuances prior to that hearing, Landrigan's trial counsel expressly stated that "[i]n the presentation of mitigating factors, rather than presenting it piecemeal, *I wish to present it all at one time*." JA 11 (emphasis added). That statement belies any contention that the sentencing hearing, at which trial counsel planned to present testimony from Landrigan's mother and ex-wife, was to be merely the start of a further investigative

phase. The sentencing hearing was always intended to be a sentencing hearing, and any suggestion to the contrary by the State can only be understood as a post hoc reconstruction of the actual course of the proceedings.

At bottom, the State's effort to blame Landrigan only serves to emphasize the need for an evidentiary hearing. As the en banc Ninth Circuit observed, "Landrigan's evidence has not been tested" and "Farrell has not been given an opportunity to explain what steps were taken in his investigation or why he did not do more." Pet. App. A-21. At this juncture, the State's conjecture cannot suffice to deny Landrigan an opportunity to establish the factual basis for his Sixth Amendment claim. His allegations, and the evidence submitted to the district court thus far, satisfy the colorable claim standard with respect to deficient performance.

2. Prejudice.

As with performance, further evidentiary development is warranted to determine whether trial counsel's ineffective assistance prejudiced Landrigan within the meaning of *Strickland*. As the en banc Ninth Circuit observed, "there was a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge." Pet. App. A-19. Landrigan's district court pleadings allege precisely the kind of "troubled history" that is "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535; *see also Penry*, 492 U.S. at 319 ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (internal quotation marks omitted)).

Moreover, the evidentiary materials Landrigan submitted to the district court suggest the existence of a powerful

mitigation case: a father who was a violent, paranoid drug addict and a mother who abused amphetamines, amphetamine-derivative inhalants, and alcohol while pregnant with Landrigan, JA 153-55, 161; malnutrition, untreated illness, and abandonment as an infant, JA 197-200; an alcoholic adoptive mother who was physically abusive, JA 148, 162, 183; serious alcohol and drug abuse beginning at an early age and becoming chronic during the teenage years, JA 186-87, 217-18, 225-26, 237; and admission to juvenile facilities as well as a psychiatric hospital, where Landrigan was treated with psychotropic drugs, JA 51, 148, 185, 228. *See supra* pp. 12-13.

Landrigan also submitted a declaration from Dr. Thomas C. Thompson, a psychologist who conducted clinical interviews and a neuropsychological evaluation of Landrigan and prepared a detailed family and social history. Dr. Thompson concluded that Landrigan suffers from a "brain dysfunction" that causes him to experience "difficulties in reasoning, forming useable strategies, and profiting from feedback." JA 149. He also diagnosed Landrigan with Antisocial Personality Disorder, which means that Landrigan was "unable to learn from past experiences, anticipate future consequences, or generalize [his] experiences into an organized body of knowledge that [could] serve to guide [his] behavior in an adaptive fashion." JA 152-53. Dr. Thompson confirmed that Landrigan's behavior fit the pattern of deficits associated with fetal alcohol syndrome. JA 155-56, 183.

Based on both the social history and the clinical evaluation, Dr. Thompson concluded that the "extent of [Landrigan's] disordered behavior was subsequently beyond the control of Mr. Landrigan. His actions did not constitute a lifestyle choice in the sense of an individual operating with a large degree of freedom, as we have come to define free

will." JA 160. Dr. Thompson explained that "[t]he inherited, prenatal, and early developmental factors severely impaired Mr. Landrigan's ability to function in society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behaviors and their impact on society and its individual members." JA 160.

If established at an evidentiary hearing, the mitigation case Landrigan has alleged might well have made a difference in the ultimate assessment of Landrigan's "moral culpability." *Terry Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 535. Given the nature of the mitigating evidence, there is a reasonable probability that a competent attorney would have introduced it at sentencing, *see Wiggins*, 539 U.S. at 535, and that it would have made a difference in the outcome. Moreover, although Landrigan's outbursts at sentencing may have hurt his cause, those outbursts might not have occurred in the context of an adequately prepared mitigation case. And even if the outbursts had occurred, "if Landrigan's counsel had offered such mental health information, it could have actually explained his courtroom behavior and tempered his effect." Pet. App. A-20 n.5.[14]

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[14] In assessing Landrigan's mitigation evidence, the State focuses solely on "the suggestion that Landrigan suffers from antisocial personality disorder." Pet'r Br. 24. As the Ninth Circuit noted, however, that diagnosis "is only a small piece of the puzzle; the crux of Landrigan's argument is that the sentencing judge was never apprised of the full panoply of circumstances that, in the expert's opinion, converged to result in 'disordered behavior [that] was beyond the control of Mr. Landrigan.'" Pet. App. A-20 n.5 (quoting Dr. Thompson's affidavit, reprinted at JA 160). And the Arizona Supreme Court itself has held that the mitigating effect of antisocial personality disorder is greater when – as in Landrigan's case – there is evidence that the disorder "controlled [the] defendant's conduct or impaired his mental capacity" than when evidence suggests that, at the time of the crime, the defendant "possessed the ability to restrain himself." *State v. Brewer*, 826 P.2d 783, 802-03 (Ariz.

Nor was the State's aggravation case so compelling that an adequately prepared mitigation case could not have yielded a different outcome. This Court has made clear that counsel's failure to present mitigating evidence can be prejudicial even if the aggravating evidence is strong. *See Terry Williams*, 529 U.S. at 368, 398-99 (noting that, among his other crimes, Williams confessed to "brutally assault[ing] an elderly woman," leaving her "in a vegetative state," yet still finding that the mitigating evidence that counsel failed to investigate could have tipped the balance (internal quotation marks omitted)). The case in aggravation here was certainly no stronger than in *Terry Williams*, where the state demonstrated that Williams was "in the midst of a crime spree, preying on defenseless individuals," and presented powerful evidence that he "would commit future criminal acts of violence and . . . constituted a continuing threat to society." *Williams v. Warden of the Mecklenburg Correctional Center*, 487 S.E.2d 194, 196, 199 (Va. 1997), *rev'd in part*, 163 F.3d 860 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). Indeed, in the present case the sentencing judge

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1992), *cited in* Pet. at 21; *see also State v. Jones*, 4 P.3d 345, 367 (Ariz. 2000) ("An antisocial personality disorder, combined with other factors, may be a mitigating circumstance."); *State v. Eastlack*, 883 P.2d 999, 1019-20 (Ariz. 1994) (remanding for resentencing where the trial court failed to appoint an expert to explore mitigating evidence, in view of a psychiatrist's testimony at the guilt phase "that defendant had an antisocial personality disorder and that his mental condition may have been altered at the time of the murders due to cocaine use," and in view of testimony at sentencing that the defendant may not have "receive[d] proper bonding and attachment during the early part of his life"); *State v. McMurtrey*, 664 P.2d 637, 645-46 (Ariz. 1983) (remanding for resentencing because the trial judge failed to consider evidence of an antisocial personality disorder in the context of other mitigating evidence, such as a difficult family history). On resentencing in *Eastlack*, the court looked to the same factors that are at issue in Landrigan's case and concluded that the mitigating factors were substantial enough to call for leniency. JA 252.

expressly found that the murder was not "especially heinous, cruel or depraved," Pet. App. D-19, and the Ninth Circuit concluded that there was only "limited evidence" to support the conclusion that the murder was committed for pecuniary gain. Pet. App. A-20.

Until Landrigan's available mitigation evidence can be developed and subjected to adversarial testing, there is no reliable basis for assessing whether the failure by Landrigan's trial counsel to develop and present that evidence creates a probability "sufficient to undermine confidence in the outcome" of his sentencing proceeding. *Strickland*, 466 U.S. at 694; *see Wiggins*, 539 U.S. at 534. The State will have every opportunity to subject Landrigan's evidence to the crucible of adversarial testing. But Landrigan has certainly offered enough in the way of allegations and evidence with respect to prejudice to satisfy the "colorable claim" standard and entitle him to the evidentiary hearing he did not receive in state court.

3. The Purported "Waiver."

Further evidentiary development is also warranted on the issue of whether Landrigan's conduct "waived" his right to present a mitigation case and, consequently, his right to pursue a claim for ineffective assistance of counsel. Seeking to establish a conclusive waiver, the State repeatedly invokes the state post-conviction court's finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." Pet. App. F-4. As the Ninth Circuit correctly concluded, however, the transcript of the colloquy between Landrigan and the state trial court judge, and whatever findings the state courts may have made based on that colloquy, do not conclusively foreclose relief, and thus cannot be a basis for denying Landrigan an evidentiary

hearing. Pet. App. A-16, A-17.[15] To the contrary, Landrigan's allegations, if established, would entitle him to relief notwithstanding the colloquy at sentencing.

First, and most importantly, Landrigan contends that his actions at sentencing were themselves the product of his trial counsel's deficient performance. Any purported "waiver" therefore flowed directly out of trial counsel's ineffective assistance. At the time of the sentencing hearing, trial counsel had next to nothing to present in mitigation. He had failed to follow up on the examining psychologist's recommendation to conduct a full evaluation for presentation at sentencing and had failed to follow up on the many leads for additional mitigating evidence identified by the psychologist's initial examination and other sources. *See supra* pp. 9-11. He had likewise failed to prepare a social history or even interview the members of Landrigan's adoptive family (who would have been willing to provide powerful mitigating testimony). JA 188-89, 192; *see supra* pp. 9-10. Indeed, even with respect to the two witnesses he

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[15] The State appears to believe that the Ninth Circuit definitively held that Landrigan did not waive his right to put on any and all mitigation evidence and thus to pursue an ineffective assistance of counsel claim in post-conviction proceedings. Pet'r Br. 10-11. In Respondent's view, the better reading of the opinion is that the Ninth Circuit remanded for an evidentiary hearing on all issues comprised within Landrigan's claim, including the purported waiver. Pet. App. A-17 (noting that the record does not "indicate that Landrigan's decision was informed and knowing" and commenting on other deficiencies in the record). Of course, it would certainly have been defensible for the Ninth Circuit to conclude, based on the existing record, that the state court's waiver ruling was an unreasonable application of clearly established law and an unreasonable factual determination. In any event, this Court "reviews judgments, not statements in opinions." *Johnson v. DeGrandy*, 512 U.S. 997, 1003 & n.5 (1994) (internal quotation marks omitted). Because the judgment to remand for an evidentiary hearing was plainly correct, it should be affirmed. The Court's opinion can clarify the appropriate scope of the issues subject to consideration at the evidentiary hearing.

brought to testify, trial counsel apparently never inquired in advance into family history and other potential sources of mitigating information. *See supra* p. 9 n.5.

Thus, even assuming *arguendo* that the colloquy could be construed as a renunciation of Landrigan's right to put on any mitigation case, Landrigan did so without knowing what he would be giving up. His decision can hardly be said to be an "informed strategic choice made by the defendant," *Strickland*, 466 U.S. at 691, based on an adequate foundation provided by counsel. To the contrary, whatever choice Landrigan may have made during the sentencing hearing, it was a choice lacking any foundation whatsoever because his trial counsel had not done the work necessary to prepare an adequate case in mitigation.

Indeed, there is at least a reasonable probability that the sentencing hearing would have unfolded in an entirely different manner had Landrigan's counsel investigated and been ready to present the mitigation case that was available, including the complete social history, expert medical testimony, and accounts of other witnesses. Even if Landrigan had not wished to subject his mother and ex-wife to the strain of testifying, the mitigation case could have been made through the many other available witnesses. But Landrigan had no idea that this alternative approach was available to him because his trial counsel had not prepared the case.

At bottom, Landrigan's purported "waiver" was simply a manifestation of the prejudice Landrigan suffered as a result of trial counsel's deficient performance. *See Strickland*, 466 U.S. at 691; *see also Hill*, 474 U.S. at 56-60 (ineffective assistance renders a waiver of the right to trial invalid if, absent counsel's deficient performance, there is a reasonable probability that the defendant would not have effected the waiver). Because the validity of any purported waiver is

inextricably intertwined with the issue of trial counsel's performance, it must be the subject of an evidentiary hearing.[16]

Second, even apart from its roots in trial counsel's deficient performance, Landrigan contends that any purported waiver was not knowing and intelligent. *See Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-40 (1973). For a waiver to be knowing and intelligent, the defendant must have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).[17]

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[16] The state post-conviction court brushed aside Landrigan's statement that he "would have cooperated" on the ground that "the defendant's statements at sentencing belie his new-found sense of cooperation." Pet. App. F-4. That conclusion ignores the fact that Landrigan *did* cooperate with counsel's scant investigative efforts. *See supra* pp. 3, 11. Further, an evidentiary hearing would give the court the benefit of live testimony from Landrigan (along with other relevant witnesses), not just an affidavit. Finally, the state court's conclusion can be only as strong as the reasoning on which it rests – *i.e.*, the court's understanding of "the defendant's statements at sentencing" as a broad, valid waiver of his right to present mitigation evidence. *See Wiggins*, 539 U.S at 530-31 (rejecting state court's factual determination because it was based on an erroneous assumption).

[17] *See also Coleman v. Mitchell*, 268 F.3d 417, 447-48 & n.16 (6th Cir. 2001) (alleged waiver was invalid because the record did not show that petitioner "had any understanding of competing mitigation strategies"); *Battenfield v. Gibson*, 236 F.3d 1215, 1229-33 (10th Cir. 2001) (alleged waiver was invalid where there was "no indication [counsel] ever explained the general meaning of mitigation evidence . . . or what specific mitigation evidence was available" and "only knew that [counsel] intended to put his parents on the witness stand"); *Wilkins v. Bowersox*, 145 F.3d 1006, 1015-16 (8th Cir. 1998) (alleged waiver was invalid where the petitioner "did not understand his legal alternatives"); *cf. Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990) (treating it as self-evident that valid waiver of the right to appeal a death sentence must be knowing and voluntary).

The State does not contest that Landrigan's waiver must be knowing and intelligent. And the state courts made no finding that Landrigan's conduct was a knowing and intelligent waiver. The State therefore resorts to attacking Landrigan for an argument he does not make – namely, that the right to put on a case in mitigation can never be waived. *See* Pet'r Br. 23. And while the State argues in the alternative that "there should be no doubt that Landrigan understood the basic concept of mitigation," Pet'r Br. 21, the present record does not provide any support for that contention. In particular, the record does not reflect that Landrigan was ever informed of the nature and extent of his right to present a case in mitigation. *Cf. Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (court taking guilty plea is responsible for ensuring that the record is adequate for review). After the court asked Landrigan if it was true that he did not wish to present mitigating evidence, it further asked, "Do you know what that means?" Landrigan replied, "Yeah." Pet. App. D-3. That is the *entirety* of the recorded colloquy with Landrigan regarding his understanding of the mitigation right; it provides no basis for ascertaining whether Landrigan in fact understood the right.

Nor can a valid waiver be established on the basis of trial counsel's statement that he "told [Landrigan] that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing." Pet. App. D-3. Read in context, trial counsel's statement is quite clearly about the two witnesses available to testify – not about a broad mitigation case (which, after all, counsel had failed to prepare). Moreover, even if true (an issue that should be subject to adversarial testing at an evidentiary hearing), trial counsel's representation does not come close to establishing that Landrigan had been informed of the

meaning of "mitigating evidence," the utility of presenting mitigating evidence, what can constitute mitigating evidence, and the consequences of waiving the right to present mitigating evidence. *Cf. Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). And without knowing what kind of mitigation case was available to him in the first place, Landrigan was of course in no position to make an informed decision on this critically important question.

Third, Landrigan contends that his intent was not to effect a broad waiver but, instead, merely to waive presentation of testimony from his mother and his ex-wife. The Ninth Circuit en banc majority concluded that the colloquy was most reasonably interpreted in this way, and the two dissenters did not disagree. *See* Pet. App. A-12 to A-16, A-22 to A-27. As the majority explained, considered in context, it is very probable that Landrigan intended his answers to the state trial judge only to confirm that he did not want his mother and ex-wife to testify. After all, as the Ninth Circuit pointed out, when "the sentencing judge asked Landrigan whether he instructed his lawyer not to present any mitigating circumstances, the only mitigating evidence the lawyer could have brought to the court's attention was the testimony of the two witnesses." Pet. App. A-15.

Thus, at a minimum, there is very substantial reason to doubt that Landrigan intended to forgo his right to put on a mitigation case and that his conduct can be deemed a legally sufficient waiver of that critically important right. There is thus no basis on the current, incomplete record to deny Landrigan the opportunity to proceed further. Nothing in § 2254(d) or (e) provides any justification for denying Landrigan an evidentiary hearing – a hearing he requested in part for the very purpose of establishing that he did not intend to give up the right to make a mitigation case (and cannot be legally deemed to have done so). Although these

provisions prescribe a measure of deference to state court determinations, "[d]eference does not by definition preclude relief." *Miller-El I*, 537 U.S. at 340 (discussing §§ 2254(d)(2) and 2254(e)(1)). Likewise, this Court has stressed that AEDPA's standard for overcoming state court factual determinations is "demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*").

It is certainly possible that Landrigan will be able to substantiate his allegations that his conduct did not waive his rights because it was the product of counsel's failure to develop a mitigation case, it was not knowing and intelligent, and it was not intended to be a renunciation of all possible avenues of mitigation. Indeed, it is quite likely that he will succeed, given that the state court did not even purport to consider whether Landrigan's "waiver" was itself the product of trial counsel's deficient performance, or whether it was knowing and intelligent (and the trial transcript fails to establish that it was). Of course, the State will be able to press arguments at the evidentiary hearing regarding the scope of Landrigan's interest in pursuing a mitigation case. *See* Pet'r Br. i, 23. Those and other factual issues can be properly resolved on the basis of testimony and other evidence. They should not be conclusively determined now, before the needed evidentiary development has occurred.[18]

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[18] There is no merit to the suggestion by Amicus Criminal Justice Legal Foundation that a federal evidentiary hearing cannot bear on how the federal courts treat the state court's finding of waiver. Amicus Br. of CJLF at 5-6. The State itself does not make this argument, so this Court should deem it waived. *Cf. Miller-El II*, 545 U.S. at 256-57 n.15. In all events, it is meritless, as every court of appeals to have considered it has concluded. *See Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004) (Kozinski, J.); *Lambert v. Blackwell*, 387 F.3d 210, 235-36 & n.19 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005); *Valdez v. Cockrell*, 274 F.3d 941, 951-52 (5th Cir. 2001); *Matheney v. Anderson*, 377 F.3d

Indeed, where – as here – a state court has barred a procedurally blameless habeas petitioner from developing evidence, it would be fundamentally unjust for a federal habeas court's review of the petitioner's colorable claim to be limited to the evidence before the state court if additional evidence is relevant. Section 2254(e)(2)'s "failed to develop" standard only bolsters this conclusion. As Justice Kennedy wrote for a unanimous Court in *Michael Williams v. Taylor*, a petitioner does not "fail[] to develop" the factual basis for a claim when the lack of development is not the petitioner's fault. 529 U.S. at 432. Given that § 2254(e)(2) thus preserves Landrigan's right to an evidentiary hearing, it would be perverse for that hearing right to be rendered irrelevant because the state court prematurely decided the merits of his federal constitutional claim – without considering evidence indispensable to a just and reliable resolution of that claim. As the Ninth Circuit held, Landrigan should be given a hearing so that he can make his

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740, 747 (7th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005); *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002) (Posner, J.); *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc); *cf. LeCroy v. Secretary, Fla. Dep't of Corrections*, 421 F.3d 1237, 1262-63 & n.30 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1458 (2006); *Monroe v. Angelone*, 323 F.3d 286, 298-99 (4th Cir. 2003). Nor can amicus CJLF's argument be squared with what this Court said on the subject in *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam) – a case that CJLF does not mention. *Holland* reversed an appeals court's grant of habeas relief on the basis of a statement not properly before the state court, explaining that "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* at 652. But the Court also made quite clear that the statement *could* have been the subject of a federal evidentiary hearing, so long as § 2254(e)(2) did not preclude such a hearing. *See id.* at 652-53; *see also Bradshaw v. Richey*, 126 S. Ct. 602, 605-06 (2005) (per curiam). This conclusion applies here regardless of whether the "waiver" finding is considered a mixed question of law and fact or a purely factual determination.

case on the merits and his claim can be decided based on an accurate assessment of the facts.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

28 U.S.C. § 2243 Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2254 State custody; remedies in Federal courts

* * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * * *

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